C.C. NG & BROTHERS SDN. BHD.

v.

GOVERNMENT OF THE STATE OF PAHANG

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 196 OF 1984]
13 NOVEMBER 1984

CIVIL PROCEDURE: *Application to strike out writ - Abuse of process of Court - Inherent jurisdiction of the Court - When exercisable - Disputed transfers registered - Companies Act 1965, s. 162.*

The appellants (plaintiffs) took out a writ against eight defendants and claimed a number of reliefs. Conditional appearance was entered by the respondent (sixth defendant), who later applied to set aside or strike out the writ of summons and the statement of claim, alternatively, to strike out the names of the respondent from both the writ and the statement of claim. The application was granted. The appellants appealed.

Held:

[1] It was wrong in law for the Court below to have granted the application to strike out under its inherent jurisdiction. The transfers of certain shares, which were being disputed by the respondent, had been registered and therefore any application to strike out should have been made under s. 162(1) of the Companies Act.

[2] It was not a proper time to consider the rival submissions regarding the *locus standi* of the appellants when the inherent jurisdiction of the Court was being invoked to strike out on the ground of abuse of the process of the Court. The inherent power to dismiss an action summarily is a drastic power and should be exercised with caution. *(Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1; *Lawrence v. Norreys* [1890] 15 App Cas 210).

[Appeal allowed.]

Cases referred to:
Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ 1
Lawrence v. Norreys [1980] 15 App Cas 210

Legislation referred to:
Companies Act 1965, s. 162, 162(1)

For the appellants - Lim Kean Chye (L.M. Ong & S.K. Lee with him); M/s. Chung & Huang
For the respondent - Wan Mohammad

JUDGMENT

George Seah FJ:

We allowed the appeal and indicated that we would give our reasons at later date which we now do.

The appellants (plaintiffs in the Court below) took out a writ against eight defendants, *viz:*

1. Maran Road Sawmill Sdn. Bhd.,
2. Amanah Saham Pahang Bhd.,
3. Haji Abdul Razak bin Hitam,

4. Haji Abdul Aziz bin Abdul Rahman,

5. Ramli bin Che Isa,

6. Government of the State of Pahang,

7. Hanafiah Raslan & Mohamad (sued as a firm); and

8. Mohd. Hassan bin Merican.

and claim the following reliefs:

(a) as against the sixth defendants, a declaration that the purported termination of an agreement ("the concession agreement") made on 5 May 1978 and made between the sixth defendant and the second defendant company and purported repudiation of an assignment of 10 May 1978 are of no effect;

(b) a declaration that the sixth defendant is bound to do all such acts and things as are necessary to make effective the said concession agreement and assignment and to enable the first defendant company to continue its operation for the remainder of the term of the said concession agreement;

(c) general and special damages against the sixth defendant;

(d) as against the second defendant company, a declaration that the second defendant company is bound by the said concession agreement and assignment and that the second defendant be restrained from interfering with the operations of the plaintiff company;

(e) as against the third, fourth and fifth defendants, damages for breach of duty as directors of the first defendant company;

(f) as against the second, third, fourth, fifth, seventh and eighth defendants, general and special damages for procuring the repudiation of the said concession agreement and assignment;

(g) as against the second, third, fourth, fifth, seventh and eighth defendants, general and special damages for including the sixth defendant not to issue the forest licence for 1983-1984 to the first defendant company;

(h) as against the seventh and eighth defendants, general and special damages for negligently preparing and publishing a report on the first defendant company's operations on 21 January 1983;

(i) costs, and

(j) such other or further relief as this Honourable Court shall deem fit and just.

Conditional appearance was entered by the sixth defendant (hereinafter referred to as the respondent) and on 19 December 1983 a summons-in-chambers was taken out to (a) to set aside or strike out the summons and the statement of claim, alternatively (b) to strike out the name of the sixth defendant from the said writ and the statement of claim and other consequential relief and costs.

The application was heard before Razak J who after hearing the submissions of learned Counsel for the appellants and the respondent, ruled that "the plaintiff's membership of the first defendant was *ultra vires* the article and he could not bring himself with it to sue". The learned Judge then made an order in terms of the summons and costs. Against such ruling the appellants had appealed to the Federal Court. Before dealing with the appeal we would like to set out briefly the relevant facts.

(i) Maran Road Sawmill Sdn. Bhd. (hereinafter called the first defendant Company) were formerly solely owned by Datuk Ng Chee Cheong, Ng Wing Chong, Ng Yew and Datin Yee Wai Fong (collectively called "the Ng family") and others;

(ii) On 2 May 1978 Amanah Saham Pahang Bhd. (hereinafter referred to as the second defendant) entered into a joint venture agreement with the Ng family whereby *inter alia*, in consideration of the second defendant agreeing to assign their timber concession to the first defendant company the Ng family would undertake to transfer fifty-one (51%) per cent of the issued and paid-up shareholding of the first defendant company to the second defendant;

(iii) On 5 May 1978 the Government of the State of Pahang (hereinafter referred to as the respondent) entered into agreement with the second defendant whereby the respondent agreed to grant to the second defendant a Timber Concession in the district of Jerantut and Kuantan, Pahang containing an area of approximately 90,000 acres;

(iv) After the timber concession had been granted to the second defendant and pursuant to the joint venture agreement of 2 May 1978, the second defendant assigned to the first defendant company on 10 May 1978, all the right, title and interest of the second defendant in the said timber concession. The respondent consented to the said assignment. In turn, the Ng family transferred fifty-one per cent of their shares in the first defendant company to the second defendant;

(v) Subsequently, the Ng family transferred their remaining forty-nine per cent of their shares in the first defendant company to C.C. Ng & Brothers Sdn. Bhd. (hereinafter called the appellants);

(vi) Differences having arisen between the second defendant and members of the Ng family. Hence these Court proceedings.

Learned counsel for the appellants mounted a three-prong attack against the ruling of the learned Judge. Firstly, it was submitted that the respondent was not and could not be construed as "the person aggrieved" within the meaning of s. 162(1) of the Companies Act 1965. Section 162 reads:

162 (1) If-

(a) the name of any person is without sufficient cause entered in or omitted from the register; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member, the person aggrieved or any member or the company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.

(2) On any application under sub-section (1) the Court may decide -

(a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members or between members or alleged members on the one hand and the company on the other hand; and

(b) generally, any question necessary or expedient to be decided for the rectification of the register.

(3) The Court when making an order for rectification of a register shall by its order direct a notice of the rectification to be so lodged.

(4) No application for the rectification of a register in respect of an entry which was made in the register more than thirty years before the date of the application shall be entertained by the Court.

A number of authorities has been cited by learned counsel for the appellants in an attempt to show how the various Courts in England and Australia have dealt with this problem. In our opinion, it was unnecessary to consider this question and it was wrong for the learned Judge to do so since the matter was not properly before the Court. It was conceded by the learned State Legal Adviser, who was appearing on behalf of the respondent, that the application to strike out the writ and the statement of claim against the respondent, was made under the inherent jurisdiction of the Court and that it was not made under sub-section (1) of s. 162 of the Companies Act 1965.

Next, it was the contention of the learned counsel for the appellants that the learned Judge erred in law in declaring invalid the transfers of shares from the Ng family to the appellants when he had no jurisdiction to do so. It is common ground that the transfers had been registered on the register of members of the appellants and s. 162 of the Companies Act 1965 has laid down the statutory procedure to challenge the invalidity of such transfers. As no application was made by the respondent under sub-section (1) of s. 162 thereof this question was not properly before the Court below and the learned Judge was wrong to have entertained it.

It was lastly submitted by learned counsel for the appellants that the learned Judge was wrong in law to have held that the transfers of the shares by the Ng family to the appellants was in contravention of Article 26(2) of the first defendant company and therefore null and void. The learned State Legal Adviser of the respondent did not appear to dispute that the transfers had been registered by the first defendant company in the register of members. If the respondent are desirous of disputing the validity of these transfers they ought to comply with the statutory procedure set in s. 162 of the Companies Act 1965. Since the respondent had failed to do so, in our opinion, the matter was not properly before the learned Judge he ought not to have ruled on it.

It was contended by the learned State Adviser that the appellants had no *locus standi* to bring this action against the respondent inasmuch as the appellants were not parties to the joint venture agreement dated 2 May 1978. For the appellants it was pointed out (correctly in our opinion) that in dealing with this submission the learned Judge appeared to have failed to consider the interpretation provision contained in Article 2 of the Articles of Association of the first defendant company where the "Shareholders" have been defined to mean:

> "Ng Chee Cheong, Ng Wing Chong, Ng Yew and Yee Wai Fong. For the purposes of these Articles, the Shareholders include ..... any company or companies wholly-owned by the Shareholders and/or the immediate members of their family or families to whom and/or to which their shares in the Company may hereinafter to be transferred".

"Company" means Maran Road Sawmill Sdn. Bhd., the first defendant company and "The Agreement" means:

> "The Agreement dated 2 May 1978 made between the Shareholders and ASPA"

or to give its full name Amanah Saham Pahang Berhad, a public company limited by shares incorporated in Malaysia and having its registered office at Bangunan LKPP, Jalan Gambut, Kuantan, Pahang. It was pointed out that the appellants, C.C. Ng & Brothers Sdn. Bhd. or CCNB has also been defined in Article 2 to mean:

> "a private investment holding company limited by shares incorporated in Malaysia and having its registered office at Selangor Kwang Tung Association Building, Jalan Pudu, Kuala Lumpur, formed for the purpose of representing the Shareholders collectively".

In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the Court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the Court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution (per Lord Diplock in *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1). In *Lawrence v. Norreys* [1890] 15 App Cas 210 Lord Herschell said words to the same effect that:

> It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

In our opinion, the question posed before the learned Judge ought to be decided at the trial.

For the above reasons we allow the appeal and set aside the Order of the learned Judge in striking out the Writ and the statement of claim against the sixth defendant as we are not satisfied that the respondent had made good the various charges against the appellants. The appellants are awarded costs here and below. Deposit to be refunded to the appellants.

Also found at [1985] 1 CLJ 235